

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 99

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THE UNITED STATES, APPELLANT

vs.

JEFFERSON F. MOSER

APPEAL FROM THE COURT OF CLAIMS

INDEX

	Original	Print
Record from the Court of Claims.....	1	1
Petition.....	1	1
Exhibit to petition—Findings of fact, etc., in re Moser v. United States.....	7	4
General traverse.....	9	5
Argument and submission of case.....	9	5
Findings of fact.....	10	5
Conclusion of law.....	11	6
Opinion, Hay, J.....	11	6
Judgment.....	13	7
Defendant's application for appeal.....	13	8
Order allowing appeal.....	13	8
Clerk's certificate.....	14	8

In the Court of Claims

JEFFERSON F. MOSER
v.
THE UNITED STATES } No. B-125

I. *Petition*

Filed June 22, 1922

To the Honorable the Court of Claims:

The claimant, Jefferson F. Moser, respectfully represents:

I. He entered the United States Navy as a midshipman at the Naval Academy on September 29, 1864, and served during the Civil War, and was promoted to ensign on April 19, 1869. He remained in said service, and by successive promotions in all intervening grades he reached the grade of captain on August 10, 1903, in which grade he served until retired on September 29, 1904. He had a creditable record throughout his entire service.

He was retired on September 29, 1904, under section 1443 of the Revised Statutes. Since that date he was first paid as a captain in the Navy on the retired list at the rate of \$3,375, but afterwards, by the judgment of this honorable court, as hereinafter set forth, received the pay of a rear admiral of the lower half on the retired list to and including December 31, 1906, at the rate of \$4,000 a year. Since December 31, 1906, he was at first paid only as a captain on the retired list of the Navy. First, at the same rate of \$3,375 a year up to including May 12, 1908, and from and after the date of the act of May 13, 1908, increasing the pay of the Navy (35

Stat. 127) at the rate of pay provided by that act for a captain on the retired list of the Navy, to wit, \$3,750, until April 8, 1917, upon which date he reported under orders dated April 6, 1917, for active duty in time of war at the United States naval training station, San Francisco, California; and continued on such active duty, first at the U. S. naval training station at San Francisco, and afterwards with the commandant of the 12th naval district, until June 15, 1919, when he was detached from all active duty. From and after said 8th day of April, 1917, to June 15, 1919, he has been paid the full active duty pay of a captain of more than twenty years' service in the Navy, or at the rate of \$5,000 a year; whereas he should have received the full active duty pay of a rear admiral of the lower half, on shore duty, amounting to \$6,000 a year.

II. On the 13th day of September, 1905, the claimant filed his petition in this court, No. 28445, claiming the pay of a rear admiral on the retired list under and in accordance with section 11 of the act of March 3, 1899 (30 Stat. 1007), the only act then in existence

relating to the retirement of officers of the Navy having Civil War service, which section is as follows:

"That any officer of the Navy with a creditable record who served during the Civil War shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade."

The cause came on to be heard before this honorable court on said petition, and such proceedings were had that on the 4th day of February, 1907, this court entered judgment in his favor for the sum of \$2,537.50, as will appear by inspection of the records of this court. No appeal was ever taken from said judgment, and said judgment was reported to Congress in accordance with law, appropriated for, and paid.

3 III. In the adjudication and decision of said cause, there was necessarily involved and decided, that by force of said 11th section of the act of March 3, 1899, the claimant had attained the rank of the next higher grade, to wit, that of rear admiral, without which rank he could not have become entitled to the pay thereof. The adjudication, so made by this honorable court, constitutes a conclusive and binding determination of the rate of pay to which he is entitled, and estops the United States from contesting his right and title to the pay of a rear admiral on the retired list of the Navy.

IV. On the 6th day of March, 1912, the claimant filed another petition in this court, No. 31497, and afterwards, in the same cause filed an amended petition claiming the difference between pay as captain on the retired list of the Navy from January 1, 1907, to February 9, 1914; and this court, February 9, 1914, gave judgment in his favor for the amount of such difference amounting to \$5,843.73. From this judgment an appeal was duly taken to the Supreme Court of the United States, but before said appeal came on for hearing, the United States did, on the 17th of December, 1915, move said Supreme Court to dismiss said appeal, and the same was thereupon dismissed; whereby the judgment rendered in favor of the claimant became final, was reported to Congress in accordance with law, appropriated for, and paid.

V. On the 13th of March, 1918, the claimant filed a third petition in this court, No. 33954, claiming the difference between the pay of a captain on the retired list of the Navy and a rear admiral of the

4 lower half on the retired list from February 9, 1914, to December 31, 1917, during part of which time the claimant was in an inactive status and in the receipt of the pay of a captain on the retired list at the rate of \$3,750 a year, and during a part of which time the country was in a state of war he was on active duty and was paid as a captain on the active list at the rate of \$5,000 a year. He claimed the difference between those two rates of pay and the pay of a rear admiral of the lower half on the retired list on inactive duty, to wit, \$4,500 a year, and while on active duty the full active duty pay of a rear admiral on the active list at the rate

of \$6,000, which difference in pay amounted to \$3,101.38, for which amount judgment was entered.

From this judgment no appeal was taken to the Supreme Court of the United States and it was reported to Congress in accordance with law, appropriated for, and paid. Reference is hereby made to the full text of the decisions of this court, the first two being accompanied by opinions reported, respectively, in vols. 42 C. Cls. 86-94 and 49 C. Cls. 285-294, and in the last of which the judgment alone is reported in 53 C. Cls. 639. A copy of the findings of fact and conclusion of law and memorandum opinion accompanying said judgment is annexed as an exhibit to this petition.

VI. The claimant hereby claims the difference between pay at the rate of \$5,000 a year as a captain on active duty and \$6,000, the legal rate of pay of a retired rear admiral of the lower half on active duty, from January 1, 1918, to June 15, 1919, upon which date he was detached from all active duty and ordered to his home; and from and after that date until the date of the rendition of a judgment in this case, the difference between \$3,750 a year, the pay of a captain on the retired list of the Navy, and \$4,500, the legal rate of pay of a retired rear admiral of the lower half.

5-6 VII. This claim is made under and depends upon the following among other provisions of statute:

Navy personnel act of March 3, 1899 (30 Stat. 1007) and the act of May 13, 1908 (35 Stat. 127) fixing the rates of pay of captains and rear admirals of the Navy.

Revised Statutes, sections 1462 and 1592, and other provisions referred to and construed by the Comptroller of the Treasury in decision dated April 30, 1917 (23 Comp. Dec. 603, Memo. Bur. S. & A. vol. 7, p. 4232), providing that officers on the retired list of the Navy employed on active duty in time of war shall receive the full pay of their respective grades.

No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims five thousand dollars (\$5,000).

KING & KING,

Attorneys for Claimant.

[Jurat showing the foregoing was duly sworn to by George A. King. Omitted in printing.]

Court of Claims of the United States

No. 33954

Jefferson F. Moser v. The United States

This case having been heard by the Court of Claims, the court upon the evidence makes the following:

FINDINGS OF FACT

I. Jefferson F. Moser, the plaintiff herein, on February 4, 1907 recovered judgment in this court against the United States for \$2,537.50, in accordance with the findings of fact, conclusion of law and opinion of the court (42 C. Cls. 86). Said judgment was never appealed from and was paid by the Treasury. According to the terms of said findings of fact, conclusion of law, and opinion the plaintiff was entitled to have been retired as a rear admiral, lower nine, with a salary at the rate of \$4,500 per annum, and the increase of pay allowed him by said judgment was for the period up to and including the 31st day of December, 1906.

II. The plaintiff brought a second suit in this court for salary as a rear admiral of the lower nine from January 1, 1907, to February 9, 1914, and judgment was rendered in his favor February 9, 1914, in the sum of \$5,843.73, as will appear by reference to the official report of the case, 49 C. Cls. 285, 294.

The plaintiff has continued since the 9th day of February, 1914, to be an officer on the retired list of the Navy and has been paid \$3,750 per annum to April 7, 1917, which is the rate allowed by law for a captain on the retired list while not on active duty. On

April 6, 1917, plaintiff was ordered into active service and since that date has so served and has been paid \$5,000 per annum, which is the rate allowed by law for a captain on the retired list while on active duty in time of war.

III. Plaintiff's salary as a rear admiral would have been at the rate of \$4,500 a year while not on active duty and at the rate of \$6,000 a year while in the performance of active duty in time of war. The difference between those two rates of pay would amount from the 10th of February, 1914, to the 31st of December, 1917, to \$3,101.38.

CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides as a conclusion of law that plaintiff is entitled to recover the sum of \$3,101.38 as shown by Finding III. It is therefore ordered and adjudged by the court that the plaintiff recover of and from the United States the sum of \$3,101.38.

Memorandum

This case is decided upon the authority of *Moser v. United States*, 42 C. Cls. 86, and *Moser v. United States*, 49 C. Cls. 285. In the latter case the defendants having taken an appeal to the Supreme Court before said appeal came on to be heard voluntarily dismissed the same.

June 3, 1918.

9

II. *General traverse*

Filed Aug. 22, 1922

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises having been entered on the part of the defendant, a general traverse is entered as provided by rule 34.

III. *Argument and submission of case*

On March 7, 1923, this case was argued and submitted on merits by Mr. George A. King, for the plaintiff, and by Mr. John G. Ewing, for the defendant.

10 IV. *Findings of fact, conclusion of law, and opinion of the court by Hay, J.*

Entered March 19, 1923.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

Jefferson F. Moser, the plaintiff herein, on February 4, 1907, recovered judgment in this court against the United States for \$2,537.50, in accordance with the findings of fact, conclusion of law, and opinion of the court. (42 C. Cls. 86.) Said judgment was never appealed from and was paid by the Treasury. According to the terms of said findings of fact, conclusions of law, and opinion the plaintiff was entitled to have been retired as a rear admiral, lower half, with a salary at the rate of \$4,500 per annum, and the increase of pay allowed him by said judgment was for the period up to and including the 31st day of December, 1906.

II.

The plaintiff brought a second suit in this court for salary as a rear admiral of the lower half from January 1, 1907, to February 9, 1914, and judgment was rendered in his favor February 9, 1914, in

the sum of \$5,843.73, as will appear by reference to the official report of the case. (49 C. Cls. 285, 294.)

The plaintiff continued since the 9th day of February, 1914, to be an officer on the retired list of the Navy and was paid \$3,750 per annum to April 7, 1917, which is the rate allowed by law for a captain on the retired list while not on active duty. On April 6, 1917, plaintiff was ordered into active service and since that date has so served and been paid \$5,000 per annum which is the rate allowed by law for a captain on the retired list while on active duty in time of war.

III.

Plaintiff's salary as a rear admiral would have been at the rate of \$4,500 a year while not on active duty and at the rate of \$6,000 a year while in the performance of active duty in time of war. The difference between those two rates of pay would amount from the 10th of February, 1914, to the 31st of December, 1917, to \$3,101.38, for which amount this court entered judgment in his favor in the third suit, No. 33954, from which judgment no appeal was taken and the same was paid.

11

IV.

From January 1, 1918, the plaintiff continued on active duty until June 15, 1919. From June 16, 1919, he reverted to an inactive status in which he still remains.

There would be due the claimant if held entitled to the difference in pay between the rank of captain after twenty years, and that of rear admiral of the lower half on the retired list of the Navy while on active duty from June 16, 1919, to March 15, 1923, the sum of \$4,270.83.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is entitled to recover the sum of \$4,270.83 the amount due him on March 15, 1923. It is therefore adjudged and ordered by the court that the plaintiff recover of and from the United States the sum of four thousand two hundred and seventy dollars and eighty three cents (\$4,270.83).

OPINION.

HAY, Judge, delivered the opinion of the court:

This case is decided upon the authority of Moser v. United States, 42 C. Cls. 86, and Moser v. United States, 49 C. Cls. 285, and the case of Moser v. United States, 53 C. Cls. 639. In the case reported in 49 C. Cls. 285 the defendant took an appeal to the Supreme Court of the United States, but before the appeal came on to be heard the United States dismissed the same.

This court in this case has had its attention called to the case of Jasper v. United States, 43 C. Cls. 368, which case was decided

after the case of Moser v. United States, 42 C. Cls. 86, and before the decision of the case of Moser v. United States, 49 C. Cls. 285. In the Jasper case the Government relied upon the act of June 29, 1906, 34 Stat. 554, and the court decided that the plaintiff Jasper was not entitled to recover, thereby reversing the first Moser case. When, however, the court came to consider the second Moser case, 49 C. Cls. 285, it reaffirmed the first Moser case, and decided that the questions involved were res judicata. That case was followed by the third Moser case, 53 C. Cls. 639, reaffirming the first and second Moser cases upon the ground of res judicata; and we see no reason for changing our views as to the case at bar, which involves the same questions decided in the former three Moser cases.

While the Jasper case does reverse the first Moser case, yet this court is not infallible, and it may have been wrong in its then construction of the act of June 29, 1906, supra. It was urged in the Jasper case by able counsel that the act of June 29, 1906, did not affect the rights of the plaintiff in that case, and after a careful consideration of that act we are of opinion that the provisions of the statute do not affect the rights of the plaintiff in this case. The rank and pay of retired officers becomes fixed upon their retirement. The plaintiff was retired under the act of March 3, 1899, 30 Stat. 1007, and under that act the court held that service as a cadet constituted service during the Civil War within the meaning of that act. The act of June 29, 1906, in terms provided that service as a cadet should not be accounted service during the Civil War in the application of the act of March 3, 1899, but there was a proviso attached to the act of June 29, 1906, which reads as follows: "*Provided*, That this act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the Navy and placed on the retired list by virtue of the provisions of a special act of Congress." This proviso was manifestly intended for the benefit of officers who were on the retired list at the date of the passage of this act. The plaintiff was on the retired list then, and had been for some years, and had received at the date of his retirement an advance of grade, and therefore the provisions of the act did not then and do not now apply to him.

For the reasons above stated we are of the opinion that the plaintiff is entitled to recover. It is so ordered.

Graham, Judge; Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

13

V. Judgment of the court

At a Court of Claims held in the city of Washington on the nineteenth day of March, A. D. 1923, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff, and do order, adjudge, and decree that the plaintiff,

as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of four thousand two hundred and seventy dollars and eighty-three cents (\$4,270.83).

BY THE COURT.

VI. Defendant's application for appeal

From the judgment rendered in the above-entitled cause on the 19th day of March, 1923, in favor of claimant, the defendant, by its Attorney General, on the 11th day of June, 1923, makes application for, and gives notice of, and appeal to the Supreme Court of United States.

ROBERT H. LOVETT,
Assistant Attorney General.

Filed June 11, 1923.

VII. Order of court allowing appeal

It is ordered by the court that the defendant's application for appeal be and the same is allowed.

Entered June 18, 1923.

14 Court of Claims of the United States

Jefferson F. Moser vs. The United States

No. B-125

Clerk's certificate

Filed June 21, 1923

I, F. C. Kleinschmidt, assistant clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law and opinion of the court by Hay, J.; of the judgment of the court; of the defendant's application for an appeal to the Supreme Court of the United States; of the order of court allowing appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this twenty-first day of June, A. D. 1923.

[SEAL.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

(Indorsement on cover:) File No. 29707. Court of Claims. Term No. 99. The United States, appellant, vs. Jefferson F. Moser. Filed June 26th, 1923. File No. 29707.